

Honorable Jamal N. Whitehead

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

VALVE CORPORTION,

Plaintiff,

v.

LEIGH ROTHSCHILD, ROTHSCHILD

BROADCAST DISTRIBUTION

SYSTEMS, LLC, DISPLAY

TECHNOLOGIES, LLC, PATENT ASSET

MANAGEMENT, LLC, MEYLER LEGAL

PLLC, AND SAMUEL MEYLER

Defendants.

) Case No.: 2:23-cv-01016

) **DEFENDANT'S SUPPLEMENTAL BRIEF**

) **IN SUPPORT OF DEFENDANT'S**

) **MOTION TO DISMISS PLAINTIFF'S**

) **SECOND AMENDED COMPLAINT FOR**

) **DECLARTORY JUDGMENT**

Pursuant to the Court’s Order for Supplemental Briefing (ECF No. 48), the parties met and conferred on May 31, 2024, and June 2, 2024. At those conference, the parties agreed that Texas state law applies to Plaintiff Valve Corporation’s breach of contract claim but could not reach agreement on which litigation privilege law applies, *i.e.*, federal, Washington, or Texas. Defendants now submit their Supplemental Brief addressing the application of Texas state law to Plaintiff’s breach of contract claim and which litigation privilege law applies, as well as how that law should be applied to the facts of this case.

**A. Application of Texas State Law to Plaintiff’s Breach of Contract Claim**

Plaintiff accuses Defendants of both breach and anticipatory breach of the General Settlement and License Agreement (“GSLA”) between Plaintiff, on the one hand, and Defendants Leigh Rothschild and Display Technologies, LLC (“DT”) on the other hand. *See, e.g.*, ECF No. 1-1. In particular, Plaintiff accuses Defendant Rothschild Broadcast Distribution System, LLC (“RBDS”) of breaching clause 3.1 of the GSLA and anticipatorily breaching clause 3.2 by asserting an already-licensed patent in correspondence and demanding additional payment for rights to already-licensed patents. *See* ECF No. 38 at ¶¶ 72-75. Plaintiff accuses DT of having breached the covenant not to sue in the GSLA by filing a lawsuit in 2022 that asserted, *inter alia*, U.S. Patent No. 9,300,723 (“the ‘723 patent”). *See id.* at ¶ 76. And Defendant Leigh Rothschild is accused of breach and/or anticipatory breach by virtue of his ownership of RBDS and DT. *See id.* at ¶ 77.

First, with respect to the alleged breach of the covenant not to sue by DT when in filed suit in 2022, Plaintiff deliberately ignores the fact that DT dismissed that suit within days of being informed by Plaintiff that one of the asserted patents was covered by the GSLA. *See* ECF No. 40 at 15, ECF No. 42 at 8. Plaintiff thereafter did nothing. *See id.*

Under Texas law, a party to a contract may waive its right to claim breach either expressly

1 or by conduct that is inconsistent with an intent to claim that right. *Jernigan v. Langley*, 111  
2 S.W.3d 153, 156 (Tex. 2003); *U.S. Fid. & Guar. Co. v. Bimco Iron & Metal Corp.*, 464 S.W.2d  
3 353, 357 (Tex. 1971); *Martin v. Birenbaum*, 193 S.W.3d 677, 681 (Tex.App.—Dallas 2006, pet.  
4 denied). Indeed, prolonged silence or inaction in asserting a known right alone can be sufficient.  
5 *See Martin*, 193 S.W.3d at 681.

6  
7 Here, since Plaintiff did nothing for over a year after DT dismissed the lawsuit against it,  
8 Plaintiff should be found to have waived any claim it may have had for breach of contract based  
9 on the filing of that lawsuit.

10 Second, with respect to the alleged breach of clause 3.1 by RBDS by purportedly asserting  
11 an already-licensed patent in a letter to Plaintiff, as shown by the plain language of both Mr.  
12 Meyler's letter to Plaintiff and Mr. Falcucci's email to Plaintiff, neither demanded any payment  
13 for Plaintiff. *See* ECF No. 1-8, ECF No. 1-5. (Falcucci email). Plaintiff's allegations to the  
14 contrary in the Second Amended Complaint should be ignored.

15  
16 It is perfectly appropriate for a district court to consider documents, such as Mr. Meyler's  
17 letter and Mr. Falcucci's email, in deciding Defendant's Motion. Under Fifth Circuit law, a court  
18 may consider documents on a motion to dismiss without converting that motion into one for  
19 summary judgment where the documents are central to Plaintiff's claims and are referred to in  
20 the complaint. *In Re Katrina Canal Breaches Lit.*, 495 F.3d 191, 205 (5th Cir. 2007) (considering  
21 insurance contracts on a motion to dismiss); *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d  
22 285, 299 (5th Cir. 2004) (affirming dismissal of defendant under 12(b)(6) based on consideration  
23 of documents that explained the legal relationship between the defendants); *Collins v. Morgan*  
24 *Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000) (approving consideration of  
25 documents attached to motion to dismiss noting that "[i]n so attaching, the defendant merely  
26 assists [ . . . ] the court in making the elementary determination of whether a claim has been  
27  
28

1 stated.”).

2 Here, the documents attached to Plaintiff’s original Complaint plainly show that  
3 Plaintiff’s allegations in the Second Amended Complaint need not be taken as true—no  
4 additional payment for an already-licensed patent was ever demanded by either Mr. Meyler or  
5 Mr. Falcucci.  
6

7 Finally, with respect to the alleged anticipatory breach of clause 3.2 by RBDS, Texas law  
8 provides that “to prevail on a claim for anticipatory breach, a plaintiff must establish each of the  
9 following elements: (1) an absolute repudiation of the obligation; (2) a lack of just excuse for the  
10 repudiation; and (3) damage to the nonrepudiating party.” *Narvaez v. Wilshire Credit Corp.*, 757  
11 F. Supp. 2d 621, 630 (N.D. Tex. 2010). In this case, however, Plaintiff cannot show any of these  
12 elements.  
13

14 Indeed, considering element (1) for example, it is undisputed that DT, and, by extension,  
15 Leigh Rothschild, the owner of both DT and RBDS, immediately dismissed the lawsuit against  
16 Plaintiff involving the ‘723 patent *immediately* upon being informed that it was covered by the  
17 GLSA. Such is hardly evidence of an “absolute repudiation” of the covenant not to sue in the  
18 GLSA.  
19

20 Similarly, considering element (2), when informed by Plaintiff that the ‘723 patent was  
21 covered by the GLSA, Defendants provided Plaintiff with a reasonable excuse for its actions,  
22 viz., a clerical error by Defendants’ outside counsel at the time.

23 Finally, considering element (3), Plaintiff has not alleged any damages that it incurred  
24 due to filing of the lawsuit that included the ‘723 patent. Indeed, given that the case was dismissed  
25 within two weeks of filing and Plaintiff never even appeared, it is difficult to conceive of any  
26 “damage” actually suffered by Plaintiff.  
27  
28

**B. Federal Litigation Privilege Law Should Apply**

Under the Federal Rules of Evidence, federal common law generally governs claims of privilege. *See* Fed. R. Evid. 501. The only exception is when “state law [alone] supplies the rule of decision.” *Id.*

Here, as noted by the Court in its Order for Supplemental Briefing, Plaintiff has alleged both federal and state law claims in its Second Amended Complaint. *See* ECF No. 48 at 2. The contested evidence here includes Mr. Meyler’s communications with Plaintiff regarding Defendants’ patents, including possible infringement of the patent which is the subject of Plaintiff’s declaratory judgment claims. And where the same evidence relates to both federal and state law claims, this Court “[is] not bound by [state] law” on privilege. *Agster v. Maricopa Cnty.*, 422 F.3d 836, 839 (9th Cir. 2005). Instead, federal privilege law should control. *See id.*; *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 367 n. 10 (9th Cir. 1992) (per curiam); *see also Facebook, Inc. v. Pac. Nw. Software, Inc.*, 640 F.3d 1034, 1041, 1038 (9th Cir. 2011) (applying state contract law to determine whether in mediation the parties reached an enforceable settlement of plaintiffs’ federal and state law claims, but applying federal privilege law to determine what evidence from mediation was admissible in support of that determination).

Under federal common law, the litigation privilege is applied very broadly to protect the counsel. *See Briscoe v. LaHue*, 460 U.S. 325, 335 (1983) (“In short, the common law provided absolute immunity from subsequent damages liability for all persons — governmental or otherwise — who were integral parts of the judicial process.”). Accordingly, all of Mr. Meyler’s actions and statements at issue in this case should be found to be protected by the litigation privilege.

I certify that this Supplemental Brief has 1417 words, in compliance with the Court’s Order for Supplemental Briefing (ECF No. 48).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 7, 2024, I filed the within through the ECF system and that notice will be sent electronically to all counsel who are registered participants.

/s/ Donald R. McPhail  
Donald R. McPhail